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NOTICE REQUIRED BEFORE EXERCISE BY MORTGAGEE OF POWER OF SALE UNDER THE REAL PROPERTY ACTS (Q'LD.)*

by

J. P. KELLY, B.A.

Solicitor of the Supreme Court of Queensland.

The decision in *Hall* v. *Hall*, [1956] Q.W.N. 28, wherein it was held that although the periods of time, referred to in s. 57 of *The Real Property Acts* 1861 *to* 1956 as the periods which must elapse before a mortgagee can exercise his powers of sale under a Bill of Mortgage registered under those Acts, may be abridged by virtue of the powers set out in s. 59 of the Acts these periods cannot be dispensed with by covenant, has come as a shock to many conveyancers in Queensland.

Standard forms of Bills of Mortgage which have been in use for many years contain clauses as follows:—

> That notwithstanding anything to the contrary contained in *The Real Property Acts* 1861 *to* 1956 or any amendment thereto or any re-enactment thereof it shall not be necessary for the mortgagee in case of any default of any description hereunder to wait until such default shall have continued for the space of one calendar month or for any other period nor to give one calendar month's notice as required by the 57th section of the said Acts or any notice whatsoever but that immediately upon such default or at any time thereafter the mortgagee may at the discretion of the mortgagee sell the mortgaged land or any part thereof and all the estate and interest of the mortgagor therein and otherwise to exercise and enforce all and every the rights and powers and remedies given to the mortgagee under *The Real Property Acts* 1861 *to* 1956 or any amendment thereto or any re-enactment thereof or hereunder upon default in the same manner and to the same extent as if such default had been made and continued and such notices had been given for the time in the manner prescribed by the said Acts. This covenant is and shall be deemed to be a modification of the power conferred by the said 57th section of *The Real Property Acts* 1861 *to* 1956 or any amendment thereto or any re-enactment thereof.

Or, alternatively, as follows:—

> The powers of sale, entry, possession, distress, ejectment and all other the powers conferred by *The Real Property Act of* 1861 or by any amendment thereof may be exercised by the mortgagee immediately or at any time after default in payment of the moneys hereby secured or in the performance or observance of

* Ed. The judgment referred to, which applies only to a mortgage of land under Torrens title, does not apply in New South Wales, express provision having been made by s. 58A of the *Real Property Act* 1900-1956 enabling the parties by agreement expressed in a mortgage or encumbrance to dispense with the service of notice or the lapse of time thereafter.

The relevant provisions of the Torrens Title Acts in the other States are in the same terms as the Queensland Act, but it appears from the forms of mortgage of Torrens title land in general use that the judgment referred to has been anticipated.

any covenant herein expressed or implied and notwithstanding any omission to exercise or waiver of the right to exercise any such power on any former occasion; no notice or expiration of time whatever under the said Act or otherwise shall be required previously to the exercise of any of such powers but such notice and expiration of time shall in every case be deemed to have been given and to have duly passed respectively.

In *Hall* v. *Hall* (*supra*), the bill of mortgage contained a clause in terms identical with the former clause set out above and, default having taken place, the mortgagee gave notice to the mortgagor that she intended going into possession of the mortaged property through her agents with a view to selling. No notice was given at any time in terms of s. 57 of *The Real Property Act of* 1861. The mortgagor issued a writ claiming amongst other things an injunction to restrain the mortgagee her servants or agents from selling or otherwise disposing of the mortgaged property. It was argued on behalf of the mortgagor that the covenant in question was an attempt to contract outside The Real Property Acts and that all that was authorized by the said Acts under s. 59 was an abridgement of the time referred to in s. 57. MATTHEWS, J. upheld this contention. As reported, the decision would appear to indicate that there is only one period of time referred to in s. 57 and that this period of time may be shortened by reason of the powers contained in s. 59. There are, however, two periods of time referred to in s. 57. The first is a period of one calendar month which is stipulated as the time during which default must continue before a notice of sale may be given, and the second is a further period of one month which represents the period of the notice which must be given by the mortgagee before he can exercise his power of sale. Accordingly, the result of the decision is that the conveyancer must consider what abridgement he requires in relation to both periods. It is also clear that, so long as this decision remains law, the above two forms of covenant represent an attempt to contract out of the Acts in a manner forbidden by those Acts as interpreted in *Hall* v. *Hall*.

It is suggested that so long as the above two forms remain in use in Queensland the following clause should be added to the printed forms:—

Nothing herein contained shall be construed so as to dispense with the giving by the mortgagee of notice under s. 57 of *The Real Property Act of* 1861 and it is hereby agreed for the purposes of this mortgage that the period of time limited by the said s. 57 as the period after the expiration of which it shall be lawful for the mortgagee to give notice and as the further period after the expiration of which the mortgagee may sell, shall be shortened in each case to one day [*or as the case may be*].

A more satisfactory solution, however, would be the complete elimination of the clause in question and the substitution thereof of another clause to deal with the exercise of powers of default other than that of sale and the adoption of the following clause in use in Victoria:—

> 14 days are hereby fixed as the period of time for which the default mentioned in section 57 of *The Real Property Act of* 1861 must be continued previously to the service of the notice mentioned in that section. And 14 days are hereby fixed as the period for which default must continue after the service of notice before the power of sale given by section 57 can be exercised.

It should also be mentioned that it is loose drafting to refer to s. 57 as s. 57 of *The Real Property Acts,* 1861 *to* 1956. It is clearer and more accurate to refer to s. 57 of *The Real Property Act of* 1861, as the Amendment Act of 1877 adopts its own numbering in relation to many sections which have independent operation.

TRUSTS FOR THE BENEFIT OF THE SETTLOR'S CHILDREN

When children contingently entitled?

by

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Barrister-at-Law

The distinction between vested and contingent interests is familiar enough to most lawyers. In *Hobbs* v. *Federal Commissioner of Taxation* (1957), 6 A.I.T.R. 490, the High Court gave it a fresh significance by limiting the operation of s. 102 of the Income Tax Act to vested interests.

Section 104 provides that where a trust has been created and "(b) the income is under that trust . . . payable to or accumulated for or applicable for the benefit of a child or children of that person (i.e., the creator of the trust) who is or are under the age of 21 years and unmarried, the Commissioner may assess the trustee to pay income tax".

The tax payable represents the difference between the tax paid by the creator of the trust and that which would have been payable if the income dealt with under the section had been received by him.

The question, which was ultimately resolved by the court in favour of the taxpayer, was whether income otherwise within the section, became excluded when the infant beneficiary was contingently entitled.

A trust of certain shares provided that they were to be held by the trustees upon trust for the benefit of three children of the settlor "subject to and upon their attaining the age of 25 years or marrying under that age". In the event of a child dying before the occurrence of these contingencies the beneficiary's interest should pass in equal shares to the other two children. If there was a total failure of the trusts it was to devolve to the settlor's husband or if the husband should die then as he by will appointed. The trust deed further contained the usual clauses empowering payment and application of the income or advancement of a limited portion of capital towards the maintenance and education of the children. It was then stipulated that any income not so applied should be accumulated and treated as capital.

In the year of income the dividends derived from the trust were accumulated and credited to the one bank account and an appropriate portion allocated towards the expectant share of one of the children who was then unmarried and under 21.

The court summarily rejected the contention that the provisions for maintenance rendered the children's interests vested.

They then turned to the major issue of whether the dividends fell within the section. The answer was a short one. It was said: "It cannot be stated with certainty that the accumulation is for a particular child or that the income is applicable for the benefit of that child. The trust is contingent and although it is true that the contingencies are of a kind which make it probable that the child will enjoy the benefit of the accumulation, yet as a matter of law, it is not correct that the income which belongs to the 2,000 shares for that year must be payable or accumulated for or applicable for the benefit of that child (who) may not attain 25 or marry" (p. 496).

WHERE IS A DEBENTURE?

by

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Questions have recently been raised in several States as to the situation for death duty purposes of registered marketable debentures. The problem does not appear to be directly covered by authority, and there is room for some difference of opinion on the matter.

Pending some judicial clarification, a conveyancer charged with the task of drafting the documents for a debenture issue might well give some thought to this problem, and in particular to the form of the debenture certificates themselves.

To cite a specific example, a Sydney company made a public issue of debentures, and established registers in Sydney and Melbourne. The trust deed and certificates were substantially in the classic Palmer form, the certificates themselves being issued under the seal of the company and containing a statement or promise that the company "will pay" the principal to the registered holder on a certain day, that it "will pay" certain interest, and that it "hereby charges" its undertaking with such payments subject to the terms of the trust deed.

The trust deed is situated in New South Wales. Certain debentures were issued on the Melbourne register in the name of a person who died domiciled in South Australia, the certificates being within that State at his death.

The South Australian Commissioner of Succession Duties is likely to contend that the debenture certificates, being issued under seal, constitute specialty debts, and that they are accordingly assets situated in South Australia for duty purposes under the well-established rule that a specialty is situated where the deed is found at the time of death (*R.* v. *Williams*, [1942] A.C. 541, at p. 554). The Victorian Commissioner might claim the debentures to be Victorian assets because they are on a Victorian register; in any event the company itself would probably not recognize the executor until he produced probate granted or resealed in Victoria, and the jurisdiction of the Victorian Court to grant or reseal probate would depend upon the situation of the asset within its jurisdiction. There might also be some problem in New South Wales arising from the situation within that State of the trust deed and of the mortgaged property itself.

The first question of interest is whether a debenture certificate under seal is necessarily a specialty. A share certificate under seal is not a deed (*R.* v. *Williams, supra,* at p. 556) apparently because it contains no express promise or obligation. A valid equitable charge and an obligation to pay money can be created without a deed, and it may well be asked whether a document which, given by an individual under his hand, would create a simple obligation only, is necessarily converted into a specialty if given by a company under its seal. (See, however, *Commissioners* v. *Angus & Co. Ltd.* (1889), 23 Q.B.D. 579, at p. 582.)

The certificate in this case is probably intended to be no more, and for practical purposes it amounts to no more, than evidence of title, because any enforcement on default would have to be under the machinery of the trust deed. The holder could admittedly sue for the debt on default being made, but it must be assumed that the trustees under the trust deed would themselves take action in consequence of the same default and thus prevent the holder gaining any practical or tactical advantage over other holders of the same issue.

The problem could best be avoided in the future by casting a debenture certificate in the form of mere evidence of title, or alternatively by having it signed by some authorized person or persons without using the seal of the company. The Palmer form of certificate was, doubtless, framed with a view to giving the holder the comfort of a positive expression of his rights under the seal of the company and without regard to problems of *situs,* which are unlikely to arise in England.

In Australia (as in Canada) real problems arise, and there seems to be a conflict between the specialty rule on the one hand and the situation of the register rule on the other. The latter rule is obviously to be preferred for practical purposes, and there is no logical reason for drawing a distinction between, on the one hand, shares, which are unquestionably situated where the register is (*Erie Beach Co. Ltd.* v. *A.-G. for Ontario,* [1930] A.C. 161, at pp. 167-168, and see Halsbury, Vol. 7, 3rd Ed., at p. 44 and Vol. 15 at p. 57) and, on the other hand, registered marketable debentures, which can be dealt with only on a particular register.

Questions have incidentally arisen also in relation to registered unsecured notes, but as these are usually in the form of certificates of title rather than documents purporting to express an obligation, they seem to be generally accepted as being of the same nature as share certificates, and situated where the register is.

In *Toronto General Trusts Corporation* v. *R.*, [1919] A.C. 679, a conflict arose as to the situation of a registered Torrens title mortgage, the original instrument being at the register in Alberta and the duplicate in Ontario at the mortgagee's death. The mortgage was conceded to be a specialty, and the Judicial Committee could find no basis for saying that either the original or the duplicate was the principal or dominant instrument, and that in the case before it, and in any other case "where an obligation is created or evidenced by two or more deeds of collateral value which are found in different jurisdictions" the specialty rule gives no guidance on the question of the locality of the debt, and regard must be had to the other circumstances of the case. The claim of the State of Ontario to death duty was rejected, the place of the situation of the register being preferred.

In *R.* v. *Williams* (*supra*) at p. 559, the Judicial Committee referred to *Brassard* v. *Smith* and other cases, and to a "coherent system of principles" by which the courts ought to be guided in cases involving the *situs* of intangible assets.

It is submitted that if the present problem comes before a court, it should hold that the specialty rule affords no guidance to the *situs* of a registered debenture which is secured by a trust deed, and that the situation of the register is the determining factor. The question, however, seems still to be an open one.

THE UNPAID VENDOR AS A TRUSTEE*

Any discussion of the fiduciary relationship existing between vendor and purchaser pending completion must needs go back to the classic and oft-quoted passage in LORD CAIRNS' speech in *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321: "There cannot be the slightest doubt of the relationship subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of the Court of Equity of the property, subject only to this observation, that the vendor, whom I have called a trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property".

In *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, SIR GEORGE JESSEL, M.R., said something to much the same effect: ". . . the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession".

In view of these pronouncements the trusteeship of the vendor and its peculiar quality, in that it is subject to his own beneficial interest so long as he is unpaid, have passed into the realms of matters that cannot be questioned, but some modern cases have served to cross the t's and dot the i's in regard both to the quantum of the trust property and the duty of the vendor to preserve it.

Property to which trust extends

If there is any accretion to the actual physical property sold it seems that the vendor will hold it on the same trusts as the property subject to the contract for sale. In *Re Hamilton Snowball's Conveyance*, [1958] 2 All E.R. 319, timber that may fall and minerals that may be dug otherwise than under some pre-existing contract were cited in argument as examples of such accretions. Neither example seems a particularly good one, since both the timber and the minerals were there at the date of the contract, though the one was standing and the other unworked. In fact it is

* By courtesy of *The Law Journal*, England.

difficult to think of a plausible example, but if a vendor of a house were so ill-advised as to add on to it during the interval between contract and completion he would undoubtedly hold the additions on trust for the purchaser.

On the other hand it appears now to be settled that property which comes to an unpaid vendor by a side wind, though by virtue of his legal ownership of the property contracted to be sold, is not impressed with the constructive trust on which he holds the latter property.

In *Rayner* v. *Preston* (1881), 18 Ch. D. 1, a house which was the subject of a contract for sale was burnt down before completion and the vendor recovered on an insurance policy certain moneys which were claimed by the purchaser, but the Court of Appeal held that the purchaser had no beneficial interest therein, COTTON, L.J., saying that "So far as he [the vendor] is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part". In parenthesis it may be added that it is now settled that after entering into a contract for sale, a vendor cannot recover on a fire policy, unless it is framed as a guarantee and not an indemnity, and that if he does so the company can require repayment.

A similar principle was applied in *Re Lyne-Stephens and Scott-Miller's Contract*, [1920] 1 Ch. 472, where there was a contract to sell a house with vacant possession. In fact a lease was in existence at the time of the contract, but it came to an end before completion and the tenant paid a handsome sum to the vendor by way of dilapidations. It was held by SARGANT, J., who was affirmed by the Court of Appeal, that this sum was not received by the vendor as trustee because what was sold was "the house with possession, altogether apart from and independent of the lease, the obligations and rights under which were simply and solely a matter between the vendor and the lessee".

In effect there were express words, "vacant possession", in that case, which might in any event have concluded the matter against the purchaser, and the first of two cases on compensation for requisitioning likewise depended on express words. This was *Re Armitage's Contract, Armitage* v. *Inkpen*, [1949] Ch. 666, where, in the conditions of sale, under the heading "war damage" there was a condition that any compensation received from the requisite government departments should belong to the vendor. The premises had suffered no war damage, but were in requisition at the time of the contract and it was held that the condition covered compensation under the *Compensation* (*Defence*) *Act* 1939 which belonged to the vendor. The matter was determined solely on the express words and the question whether the vendor would have

been a trustee of the compensation in the absence of such words was not referred to by VAISEY, J.

In the recent case of *Re Hamilton Snowball's Conveyance* (*supra*), which was also a case of compensation for requisitioning, there were no words indicating to whom the compensation should belong and UPJOHN, J., therefore had to decide the question as one of principle. The facts were that the property was derequisitioned after the contract, which contained no mention of the requisitioning, and before completion, and the purchaser claimed that the vendor was trustee for her of the compensation paid to him. This claim was rejected on the ground that all that was sold was a house, with a right, not expressed in the contract, to vacant possession on completion, and the contract did not, therefore, include or comprehend the compensation, which if it had been intended to be sold should have been expressly put in as part of the subject-matter of the sale.

The result appears to be that where by virtue of his possession of the legal estate some sum of money comes to the vendor which he has not contracted in express words to sell to the purchaser, and for whose destination or apportionment no provision is made by statute, he will not hold it on the constructive trusts on which he holds the property actually contracted to be sold.

Duty to preserve property

Though the property is at the purchaser's risk as from the date of the contract so far as loss and deterioration are concerned, the vendor in his capacity of trustee is bound to take reasonable care to preserve it from deterioration. Authority for this is to be found in the old case of *Wilson* v. *Clapham* (1819), 1 Jac. & W. 36, where PLOMER, M.R., said that "the care of the estate must of necessity be left to the vendor; he becomes a trustee for the purchaser, and what hardship is there in expecting him to take the same care of it as he would if it were his own?", and in *Clarke* v. *Ramuz*, [1891] 2 Q.B. 456, where an action for breach of trust was held to lie against a vendor for failure to prevent a trespasser from removing top soil after the date of the contract and before completion.

Two fairly recent cases illustrate this rule. In *Cumberland Consolidated Holdings, Ltd.* v. *Ireland*, [1946] 1 All E.R. 284, a vendor who had contracted to sell with vacant possession had left a quantity of rubbish on the premises and the Court of Appeal held that an action for breach of trust would have lain on the ground that by abandoning his property in the rubbish he had done something detrimental to the property.

The other case, *Phillips* v. *Lamdin*, [1949] 1 All E.R. 770, was the more usual one of removing part of the trust property and not of leaving something unwelcome upon it. The property sold was a house which contained a beautiful Adams door, and this the vendor removed before completion, replacing it by one of plain white wood. CROOM-JOHNSON, J., before whom the case came, cited *Clarke* v. *Ramuz* (*supra*) and said that the vendor would have been liable if someone else had removed the door. *A fortiori*, he was liable for having removed the door himself, and, damages being an inadequate remedy, he was ordered to replace it.

CASE NOTES

Companies

Right of a shareholder who has given a proxy to vote personally—effect of same on right of nominee to vote at an adjourned meeting.—Where a shareholder of a company has given a proxy in accordance with the articles of association of the company giving a shareholder the right to vote personally or by proxy, the shareholder may attend a meeting of the company and vote personally on a show of hands without revoking the proxy, and the right of the nominee under the proxy to vote at an adjourned meeting remains unimpaired (*Ansett* v. *Butler Air Transport Ltd.* (*No.* 2) (1958), 75 W.N. (N.S.W.) 306).

Contract for Sale

Sale of land—condition that sale subject to bank finance being obtained — uncertainty — action for recovery of deposit.—A purchaser entered into a contract for the sale of land under a contract in a printed form known as "the 1954 Copyright Contract of Sale" and a special condition was added that "this sale is subject to bank finance of £1,500 being obtained for the purchaser". On a claim by the purchaser for the return of the deposit the magistrate had made an order in favour of the purchaser on the ground that the contract was uncertain and unenforceable. An order *nisi* to review the magistrate's decision was obtained, and on return of the order, it was held that a requirement that the finance should be obtained on reasonable terms should be read into the condition, and that the condition was not void for uncertainty. An offer by a bank to lend the purchaser £1,500 for three years on the usual bank terms of overdraft was refused by the purchaser, who demanded a loan for at least eighteen years. As the contract therefore went off through the purchaser's

default he was not entitled to recover the deposit and the order *nisi* was made absolute (*Jubal* v. *McHenry*, [1958] V.R. 406).

Death Duty

Gift inter vivos by deceased to son—partnership agreement between deceased and sons—deceased manager of partnership business—property used for depasturing partnership stock—whether bona fide possession and enjoyment retained by son to entire exclusion of deceased—New South Wales Stamp Duties Act 1920-1956, s. 102 (2) (d).—In 1934 the deceased transferred a pastoral property to his son by way of gift. In 1935 the deceased, the son and another son entered into a partnership agreement to carry on the business of graziers and stock dealers under which the deceased was to be the manager and his decision was to be final and conclusive in connexion with the partnership business. The respective holdings of the partners were to be used for the purposes of the partnership only and were not to be deemed an asset of the partnership. The deceased died in 1952 and the value of the property given to the son was included in the deceased's estate. It was held that the property was rightly included in the dutiable estate since from 1935 each of the partners were in possession and enjoyment of the property and, therefore, the son had not retained the bona fide possession and enjoyment of the property to the entire exclusion of the deceased or of any benefit to him within s. 102 (2) (d) of the *Stamp Duties Act* 1920-1956 (*Chick* v. *Commissioner of Stamp Duties*, [1958] 2 All E.R. 623, P.C.).

Executors and Administrators

Commission — assets transferred to beneficiaries — Wills, Probate and Administration Act 1898-1954, s. 86.—One of three executors who had acted as solicitor to the estate applied for commission. The whole of the assets had been administered and all assets transferred to the beneficiaries before the claim for commission was made. It was held (following *In the Will of John Young* (1932), 50 W.N. (N.S.W.) 4) that s. 86 of the *Wills, Probate and Administration Act* 1898-1954, which authorized the court to allow commission out of the estate of a deceased person, did not authorize the court to allow commission to an executor where there were no assets remaining in his hands out of which the commission could be allowed (*In the Will of Klemens Zyngol* (1958), 75 W.N. (N.S.W.) 241).

Landlord and Tenant

Business premises — lease of land together with trade licences and goodwill, etc.—fair rent—Landlord and Tenant (Amendment) Act 1948-1954, s. 35.—The plaintiff leased

to the defendant land on which the plaintiff conducted a service station "together with all trade licences and agencies petrol-selling rights and licences and including the business of the vendor carried on in the said premises and together with the plant and fixtures" for three years at a weekly rental of £20. After the term of the lease had expired the defendant remained in possession and on his application the fair rent of the premises and goods leased was determined by the Fair Rents Board at £10.17.6 per week, which rent from the date fixed by the Board was paid by the defendant. In an action brought by the plaintiff to recover the rent of £20 per week, giving credit for the sums paid by the defendant, HIDDEN, D.C.J., found for the defendant. On appeal from the decision it was held that the fact that the lease conferred on the tenant benefits other than a tenancy of the premises with goods did not exclude the *Landlord and Tenant (Amendment) Act* 1948-1954 and prevent the various controls imposed by it and the appeal was dismissed. (*Crundwell* v. *Bertrand*, [1953] V.L.R. 1 and *Commonwealth Oil Refineries Ltd.* v. *Hollins*, [1956] V.L.R. 169 considered; *Loder* v. *Tokoly* (1952), 52 S.R. (N.S.W.) 283 followed.) (*Junghenn* v. *Wood* (1958), 75 W.N. (N.S.W.) 353).

Prescribed premises—fair rent—whether land tax to be considered—Landlord and Tenant Act 1948-1957, s. 21 (1A). —Y. leased premises to N., who conducted a residential therein. A Fair Rents Board, in determining the fair rent of the premises, took the view that the premises were not used for business or commercial purposes within the meaning of s. 21 (1A) of the *Landlord and Tenant (Amendment) Act* 1948-1957, and that it could not consider the land tax paid by the lessor in fixing the fair rent of the premises. It was held that the fact that the premises were used solely as a dwelling-house did not prevent their being used also by the lessor or the occupiers for business or commercial purposes, and that the purpose for which the tenant used the premises was irrelevant, and accordingly that land tax should be taken into account by the Board in fixing the fair rent of the premises (*Wiseman* v. *Neilands* (1958), 75 W.N. (N.S.W.) 247).

Sale of Land

Requisitioned land—compensation payable on derequisitioning — derequisitioning after contract for sale but before conveyance—whether purchaser entitled to compensation. —The tenant of a requisitioned dwelling-house contracted to purchase it subject to the requisition. On the same day he agreed to sell it to a purchaser, no reference to the requisition being made in this contract. After the house

was conveyed to the tenant but before it was conveyed to the purchaser from him, it was derequisitioned and £248 compensation became payable by statute to the original purchaser. The second purchaser claimed the original purchaser was a trustee of the compensation for her. It was held that though after contracting to sell the dwelling-house the original purchaser was a trustee for the second purchaser he was a trustee for her only of what he had contracted to sell her, viz., the dwelling-house, and the second purchaser was not beneficially entitled to the compensation because that was not the subject of the contract (*Re Hamilton-Snowball's Conveyance,* [1958] 2 All E.R. 319).

Contract for sale—rates, taxes and outgoings—apportionment—liability to pay proportion—Land Tax Management Act 1956.—The Sydney County Council agreed to purchase certain land from Warner Brothers First International Pictures Pty. Ltd., and clause 11 of the contract provided that the vendor shall be entitled to rents and profits and shall pay or bear all rates taxes and outgoings up to the date of completion, on and after which date the purchaser shall be entitled to and shall pay or bear the same respectively. The vendor on completion claimed payment of an amount representing an adjustment for land tax paid by it in respect of the then unexpired portion of the year, and the claim was rejected by the purchasers on the ground that under s. 10 (1) (a) of the *Land Tax Management Act* 1956 it was exempt from liability for the payment of such taxation. It was held (following *Patterson* v. *Farrell* (1912), 14 C.L.R. 348) that the land tax paid by the vendor was a tax and also an outgoing within the meaning of the words in clause 11 and that the vendor was accordingly entitled to be paid the apportioned part of the tax paid by it (*Warner Brothers First International Pictures Pty. Ltd.* v. *Sydney County Council* (1958), 75 W.N. (N.S.W.) 245).

Torrens System

Refusal by Registrar-General to register transfer—appropriate proceedings to enforce registration—caveat—service of notice on caveator — effect of unregistered trust.—A transfer of land standing in the name of the vendor in favour of the purchasers, together with the certificate of title, was lodged for registration. A caveat had been lodged by the wife of the vendor forbidding registration of any instrument affecting the land until the caveat had been withdrawn or until after the lapse of fourteen days from the date of service of notice of such intended registration at the following address: C/o Harold Rich, Solicitor, 188 George Street, Sydney. The usual notices under s. 73

of the *Real Property Act* 1900-1956 were prepared by the Registrar-General and served at the address for service furnished in the caveat. Mr. Rich informed the Registrar-General that he no longer acted for the caveator, and had no information as to her whereabouts. The Registrar-General informed the transferees' solicitor by letter that he refused to register the transfer on the ground that it was considered that service on Mr. Rich was not sufficient service within the meaning of s. 73 of the Act, and for the further reason that he had learned that by order of the Supreme Court of 2 May 1953 it had been declared that the vendor was a trustee for himself and the caveator as joint tenants. An order *nisi* was made on the application of the transferees calling upon the Registrar-General to show cause why a writ of mandamus should not issue requiring him to register the transfer. It was submitted on behalf of the Registrar-General that the court should refuse to deal with the matter by way of mandamus, as the appropriate method of determining whether the transfer should be registered was by summons under s. 121 of the *Real Property Act* 1900-1956. It was agreed that a summons should be taken out under s. 121, and the matters referred to in the letter by the Registrar-General be treated as the grounds of his refusal within the meaning of that section. It was held (1) that the appropriate method of determining whether the transferees were entitled to have the transfer registered was by summons under s. 121 of the *Real Property Act* 1900-1956;

(2) that service of the notice on the caveator at the address mentioned in the caveat was sufficient for the purposes of s. 73 of the Act;

(3) that the existence of the declaration by the court of the wife's equitable interest in the land did not affect the matter, and that the Registrar-General was not entitled to have regard to the trust or raise the point that the trustee had no power of sale.

An order was made directing the Registrar-General to register the transfer (*Ex parte Little*, [1958] S.R. (N.S.W.) 173).

Will

Soldier—member of forces mobilized to operate against Malayan terrorists—actual military service—Wills, Probate and Administration Act 1898-1954, s. 10.—The deceased was a member of a force mobilized in Australia for the purpose of aiding the Malayan government against terrorists, and was killed whilst engaged with his unit in military operations in Malaya. His will was made when he was in camp under orders to prepare for movement to

Malaya and was attested by one witness only. On an application for the grant of probate of the will it was held that a state of war in the sense of a state of international conflict was not essential to a soldier being in actual military service within the meaning of the expression in s. 10 of the *Wills, Probate and Administration Act* 1898-1954, and that the will should be admitted to probate (*In the Will of Anderson* (1958), 75 W.N. (N.S.W.) 334).

Construction—gift to wife "for her use as she thinks fit during her lifetime"—absolute gift or limited to life estate. —A testator, using a printed will form, gave and bequeathed all his assets property and personal property to his wife "for her use as she thinks fit during her lifetime". There was no gift over on her death. It was held on the proper construction of the will that the wife took an absolute interest in the whole of the testator's estate (*Re Murray, Equity Trustees Executors and Agency Co. Ltd.*, v. *Murray*, [1958] A.L.R. 605).

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